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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

DAN CARDONA, Plaintiff and Respondent, v. LICHER DIRECT MAIL, INC. et al., Defendants and Appellants.	B254783 (Los Angeles County Super. Ct. No. BC341804)

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert L. Hess, Judge. Affirmed in part and reversed in part.

Law Offices of Zeutzius & LaBran, Ronald M. LaBran, William J. Zeutzius, for Plaintiff and Respondent.

Arminak & Reider, Tamar G. Arminak, for Defendants and Appellants.

* * * * * *

The trial court found a judgment debtor's corporate employer and its president liable for failing to withhold a portion of the debtor-employee's earnings pursuant to an earnings withholding order. The employer and its president challenge this ruling. We conclude that the trial court properly imposed liability on the employer and its president (albeit on a different statutory ground than the trial court), but improperly calculated the amount to be withheld and improperly awarded attorney's fees. We accordingly affirm the judgment, but reverse and remand for further proceedings as to the award of damages.

FACTS AND PROCEDURAL HISTORY

Plaintiff Dan Cardona (Cardona) sued Don McWhirter (McWhirter) for fraud, and obtained a verdict in excess of $2 million. As part of his efforts to collect on this judgment, Cardona, in March 2012, served an earnings withholding order pursuant to Code of Civil Procedure section 706.020 et seq.,[1] on McWhirter's presumed employer, a direct mail and printing company called Licher Direct Mail, Inc. (LDM). Later that same month, LDM's president, Wayne Licher (Licher), filed a return indicating that McWhirter was not an LDM employee. However, three months later, in June 2012, and as Licher later recounted, "as a result of [Cardona's] pursu[it] of McWhirter," Licher designated McWhirter as an LDM employee. Immediately thereafter, McWhirter sought an exemption from withholding for 100 percent of his employee wages. After that request was denied in August 2012, Licher and McWhirter agreed to cut McWhirter's salary from $1500 per week to $800 per week.

LDM proceeded to withhold 25 percent of McWhirter's weekly salary. LDM never withheld—or reported—any commission payments to McWhirter, even though McWhirter had been receiving commission payments at a rate of eight to ten percent for all sales to M&M Advertising prior to being classified as an LDM employee in June 2012, and even though LDM billed M&M Advertising $2,116,357 from October 2011 through February 2013 (while McWhirter was an LDM employee but reporting no

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[1] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

earnings on commission). In addition, Pund, LLC—a company McWhirter created the month after Cardona served his earnings withholding order on LDM—billed M&M Advertising for $10,129.95 for "services rendered" in September 2012 alone. LDM terminated McWhirter's employment in August 2013.

In November 2013, Cardona filed a motion to impose third party liability on LDM and Licher for noncompliance with the earnings withholding order; Cardona's motion invoked section 701.020. The trial court granted the motion, finding that LDM and Licher failed to account for the commissions that McWhirter had earned on M&M Advertising sales prior to June 2012 and presumably continued to earn thereafter. Without detailing its basis for calculation, the court ordered LDM and Licher to pay $44,298.08 on the earnings withholding order and an additional $5,000 in attorney's fees pursuant to section 701.020, subdivision (c).

LDM and Licher timely appealed.

DISCUSSION

LDM and Licher challenge the trial court's award as procedurally and factually improper. Whether the trial court complied with the procedural requirements for imposing third party liability is a question of law we review de novo. (*Piper v. Department of Motor Vehicles* (2014) 232 Cal.App.4th 1310, 1314, fn. 4.) We review the trial court's factual findings for substantial evidence, asking whether there is reasonable and credible evidence of solid value to support those findings, while viewing the evidence in the light most favorable to those findings and drawing all reasonable inferences to support them. (*People v. Banks* (2014) 59 Cal.4th 1113, 1156.)

I. Procedural mechanism

Cardona served an earnings withholding order on LDM and Licher, pursuant to California's Wage Garnishment Law, section 706.010 et seq., but asked the trial court to impose third party liability on LDM and Licher using a provision—section 701.020—aimed at a third party's noncompliance with a "writ of execution and a notice of levy." (§ 701.010.) Although earnings withholding orders and writs of execution are both procedural mechanisms falling under the umbrella of California's Enforcement of

Judgments Law (§§ 680.010-724.260; *Grayson Services, Inc. v. Wells Fargo Bank* (2011) 199 Cal.App.4th 563, 566 & fn. 1), they are separate mechanisms that are set forth in separate chapters of the Enforcement of Judgments Law and, most critically, that rest on separate procedures for their invocation, use and enforcement. (Compare § 706.010 et seq. [wage garnishment procedures] with § 699.010 et seq. [writ of execution procedures].) By its terms, section 701.020's enforcement mechanism against third parties applies only when "required by this article" (§ 701.020, subd. (a))—that is, the article dealing with enforcement through writs of execution (§ 701.010 et seq.). It does not apply to other enforcement mechanisms. (See *Ilshin Investment Co., Ltd. v. Buena Vista Home Entertainment, Inc.* (2011) 195 Cal.App.4th 612, 628-629 [refusing to apply section 701.020 to a creditor's use of independent lawsuits against third parties withholding a debtor's property under section 708.210].) Section 701.020 is accordingly not applicable to enforce a third party's noncompliance with an earnings withholding order.

However, the Enforcement of Judgments Law does contain a provision empowering a court to impose liability upon a third party that does not comply with an earnings withholding order—section 706.154. That provision provides that, "[i]f an employer fails to withhold or to pay over the amount the employer is required to withhold and pay over pursuant to this chapter, the judgment creditor may bring a civil action against the employer to recover such amount." (§ 706.154, subd. (a).) Cardona's motion for relief under section 701.020 can be construed as a request for relief under section 706.154.

In supplemental letter briefing we requested from the parties on this issue, Cardona argues that he has the *option* of proceeding under section 706.154 or section 701.020. For support, he cites *National Financial Lending, LLC v. Superior Court* (2013) 222 Cal.App.4th 262 (*National Financial Lending*). That case undercuts his argument. *National Financial Lending* applied section 701.020 to the enforcement of a notice of levy filed against a third party (*id.* at p. 268), and thereby confirms that section 701.020 is to be used for *that* particular debt collection tool—and not for earnings

withholding orders. Cardona also points out that section 706.154, subdivision (a) does not purport to be the "exclusive" remedy; however, the nonexclusivity of section 706.154 does not make it appropriate to use a remedy, such as section 701.020 that is statutorily inapplicable.

Licher and LDM argue that it may be appropriate to construe Cardona's motion as involving section 706.154, but contend that Cardona did not properly invoke section 706.154 because he filed a motion, not a separate lawsuit. To be sure, section 706.154, subdivision (a) refers to "bring[ing] a civil action." (*Id.*) But a "civil action" is not invariably a separate lawsuit; rather, "[a] civil action is prosecuted by one party against another for the declaration, enforcement or protection of a right, or the redress or prevention of a wrong." (§ 30; see also § 22.) Cardona's motion meets the statutory definition of a "civil action" because it prosecutes Licher and LDM as a means of enforcing his earnings withholding order with which they did not comply. The fact that Cardona did this by filing a motion in the still-pending lawsuit between himself and McWhirter, rather than in a separate lawsuit with its own case number, does not take his motion outside the pertinent definition. A complaint and cross-complaint are separate civil actions, even though filed under the same case number, because each entails "separate pleading[s] and represents a separate cause of action." (*Westamerica Bank v. MBG Industries, Inc.* (2007) 158 Cal.App.4th 109, 134.) The same can be said of Cardona's motion against Licher and LDM, and the underlying debt collection action. Licher and LDM assert that they are accorded fewer procedural and discovery rights if Cardona is allowed to proceed by way of motion rather than a separate lawsuit, but did not articulate in their letter brief and could not articulate at oral argument, which procedural or discovery rights they were denied.

With one exception, the trial court's order granting relief can thus be viewed as an order pursuant to section 706.154, particularly in light of section 706.154's nonexclusivity (§ 706.154, subd. (a) ["The remedy provided by this subdivision is not exclusive"]), and the parties' lack of objection to the procedural device used to adjudicate the issue of LDM and Licher's liability. But Cardona's motion is not, in fact, a motion

under section 701.020; as a result, and because section 706.154 does not provide for attorney's fees, the trial court lacked authority to award attorney's fees. (See *Chinn v. KMR Property Management* (2008) 166 Cal.App.4th 175, 190 ["Attorney fees are not generally recoverable as costs unless authorized by statute or agreement"]; § 1021.)

II. Sufficiency of the evidence

LDM and Licher can be held liable under section 706.154, subdivision (a), for the nonpayment of any amounts they were "required to withhold and pay over." (§ 706.154, subd. (a).) The statute imposes liability on the "employer" (*ibid.*), and defines "employer" as "a person for whom an individual performs services as an employee" and a "person" includes "an individual" and a "corporation" (§ 706.010, subds. (f) & (i).) Although McWhirter was employed by LDM, a corporate officer like Licher may be held personally liable if he directs a corporation to violate its statutory duties depending on the statute's terms and the nature of the duties imposed. (*Cisneros v. U.D. Registry, Inc.* (1995) 39 Cal.App.4th 548, 582-583; accord, *Martinez v. Combs* (2010) 49 Cal.4th 35, 66 [corporate officers may be liable, under the Industrial Welfare Commission's rules, if they act outside the scope of their agency]; *Taylor-Rush v. Multitech Corp.* (1990) 217 Cal.App.3d 103, 113 [corporate officers may be personally liable for "directly authoriz[ing] or actively participat[ing] in wrongful or tortious conduct"].)

Once an earnings withholding order is served on an employer, it is generally obligated to withhold 25 percent of the compensation—whether designated as "wages, salary, commission, bonus or otherwise"—paid to any employee; the earnings withholding order does not reach money paid to independent contractors. (§§ 706.011, subds. (a) & (b), 706.022, subds. (a) & (b), 706.050, subd. (a)(1); *Moses v. DeVersecy* (1984) 157 Cal.App.3d 1071, 1073-1074.) The employer's duty to withhold starts 10 days after the earnings withholding order is served and ends once the full amount of the debt has been withheld or the earnings withholding order is otherwise terminated. (§§ 706.022, subd. (a), 706.024, 706.032.)

There was substantial evidence to support the trial court's implicit finding that LDM did not properly withhold 25 percent of McWhirter's earnings. Cardona presented

evidence that McWhirter had been earning a commission of eight to ten percent on all sales to M&M Advertising before becoming an LDM employee in June 2012; that LDM continued to bill M&M Advertising while McWhirter was an LDM employee but did not report that McWhirter was earning any commissions during that period; and that McWhirter was continuing to earn commissions from M&M Advertising sales while he was an LDM employee, although the commissions were paid circuitously through an LLC McWhirter himself set up after the earnings withholding order was served on LDM.

There was also substantial evidence to support the trial court's imposition of personal liability on Licher. The evidence supports the court's implicit finding that Licher and McWhirter were actively engaged in a game of "hide the ball" with McWhirter's earnings, a game that is inimical to the Enforcement of Judgment Law and far beyond the scope of Licher's duties as LDM's president. Licher converted McWhirter to an LDM employee soon after Cardona served an earnings withholding order (which cut McWhirter's exposure to 25 percent of his salary instead of the 100 percent of the commission that might have been subject to levy through an assignment order (see § 708.510, subd. (a)) or writ of execution). Licher cut McWhirter's salary by nearly half almost immediately after McWhirter's efforts to get a 100 percent exemption from Cardona's earnings withholding order was rejected. And Licher refused to include as McWhirter's earnings any of the commissions McWhirter was earning "on the side" from sales to M&M Advertising.

This evidence supports the trial court's finding that LDM and Licher did not properly withhold 25 percent of the commissions McWhirter earned while working as an LDM employee. Although, as noted above, there was conflicting evidence as to whether McWhirter's commission rate was eight percent or ten percent, Cardona introduced evidence—namely, LDM counsel's declaration that McWhirter was earning a 10 percent commission—that was not objected to; this suffices to establish a 10 percent rate, and Licher's objections to the declaration for the first time on appeal come too late. (Evid. Code, § 353.)

Licher and LDM argue that their noncompliance is not enough to support liability because proof of "active[] participat[ion] in a fraud" is required. (§ 706.154, subd. (b).) This is true when the "employer . . . complies with the earnings withholding order" (*ibid.*), but no showing of fraud is required where, as here, the employer did not comply (§ 706.154, subd. (a)).

We nevertheless conclude that the trial court's order is overinclusive. As noted above, an earnings withholding order only reaches earnings while a person is an "employee." Here, there is insufficient evidence to support a finding that McWhirter was an LDM employee prior to June 1, 2012. (Although Licher filled out paperwork in late May designating McWhirter as an employee, it was in anticipation of McWhirter's June 1, 2012 start date.) We must accordingly reverse the trial court's award of damages, and remand so that the trial court may calculate the amount LDM and Licher should have withheld as 25 percent of the commissions McWhirter earned between June 1, 2012 and his termination in August 2013.

DISPOSITION

The judgment is affirmed in part and reversed in part and remanded for proceedings in accordance with this opinion. Parties to bear their own costs on appeal.

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_____, J.

HOFFSTADT

We concur:

_____, P. J.

BOREN

_____, J.

CHAVEZ